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BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD ASSOCIATION, INC.,

Petitioner,

v.

IDAHO STATE BOARD OF LAND COMMISSIONERS,

Respondent,

and

PAYETTE LAKES COTTAGE SITES OWNERS ASSOCIATION, INC., and WAGON WHEEL BAY DOCK ASSOCIATION, INC.,

Intervenors.

SGNA'S REPLY BRIEF ON ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This reply brief is submitted by Petitioner Sharlie-Grouse Neighborhood Association, Inc. ("SGNA") in support of its *Motion for Summary Judgment* ("*SGNA's MSJ*") filed on April 15, 2019.[1]

SGNA's MSJ sought summary judgment on the merits and as to anticipated defenses (standing and subject matter jurisdiction). It is telling that neither the Land Board nor Intervenors contest the core issue on the merits. No one disputes that if the State retained any interest in Community Beach, disposal of that interest must be in compliance with its trust duties. Intervenors do not address the merits at all, resting entirely on jurisdictional defenses. The Land Board devotes nearly all of its brief to such defenses, turning to the merits in its closing five pages. There it raises "the possibility" that it gave away its fee interest in the roads in the 1920s and 30s. That is wrong, and, in any event, not particularly relevant to this *Petition*, which seeks a ruling only with respect to Community Beach. It also suggests that 22 wrongs make a right, contending that the two *Quitclaim Deeds* were compelled (and their unconstitutionally somehow cured) by dubious language in 20 or so recently issued deeds purporting to promise subsequent

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[1] This brief replies to *Respondent's Memorandum in Opposition to SGNA's Motion for Summary Judgment* ("*Board's Response Brief*") submitted on June 14, 2019 by Respondent Idaho State Board of Land Commissioners ("Land Board"). It also replies to the *Memorandum in Opposition to SGNA's Motion for Summary Judgment* ("*Intervenors' Response Brief*") submitted on June 14, 2019 by Intervenors Payette Lakes Cottage Sites Owners Association, Inc. ("PLCSOA") and Wagon Wheel Bay Dock Association ("WWBDA") (collectively, "Intervenors"). The Land Board and Intervenors are referred to collectively as "Auction Opponents." This brief employs the same shorthand definitions as *SGNA's Opening Brief on Motion for Summary Judgment* ("*SGNA's Opening Brief*") filed on April 15, 2019. Reference is made in this brief to *SGNA's Response Brief in Opposition to Land Board's Motion for Summary Judgment* ("*Response to Land Board*") and to *SGNA'S Response Brief in Opposition to Intervenors' Motion for Summary Judgment* ("*Response to Intervenors*"), both filed on June 14, 2019, to *SGNA's Response to Intervenors Motion to Strike* ("*Strike Response*") filed on June 25, 2019, and to *Respondent's Motion for Summary Judgment and Supporting Memorandum* ("*Board's Opening Brief*") filed by the Land Board on April 15, 2019.

conveyance of the State's interest in streets and common areas. The Land Board's contention that Community Beach was no longer "preserved and held in trust" at the time of the CC&Rs and the *Quitclaim Deeds* (*Board's Response Brief* at 22) is contradicted by its own case law citation[2] and its own past actions, which clearly establish that the common law dedication resulting from the 1924 and 1932 deeds granted only an easement for use and enjoyment, with the State retaining the underlying fee and littoral rights.

The weakness of their position on the merits explains Auction Opponents' preoccupation with avoiding the merits. But those efforts fail as well.

The Land Board stands by its theory that declaratory rulings may be issued only with respect to agency actions that have not already occurred. However, it abandons its reliance on *Shobe*,[3] turning instead to a recently decided appeal in *Firefighters II*.[4] This is strange, because *Firefighters II* stands for the opposite proposition. The Court ruled that a petition for declaratory ruling seeking backwards-looking relief was a proper vehicle for addressing an allegation of past agency impropriety.

As noted in SGNA's *Response to Land Board*, the Land Board's contention that its hands are tied as to past actions is also at odds with its recent action rescinding a lease of endowment land on Tamarack Bay issued in violation of the public auction requirement. In an effort to wiggle out of this inconsistency, the Land Board inexplicably contends it may recognize the

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[2] *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* ("*Ponderosa II*"), 143 Idaho 407, 409, 146 P.3d 673, 675 (2006).

[3] *Shobe v. Ada County* ("*Shobe I*"), 126 Idaho 654, 889 P.2d 88 (1995).

[4] *Idaho Retired Fire Fighters Ass'n v. Public Employee Retirement Bd.* ("*Firefighters II*"), 2019 WL 2455584 (Idaho, June 13, 2019).

unconstitutionality of its actions with respect to permits, licenses, and leases, but not with respect to deeds.

The Land Board throws up more chaff with its erroneous contention that SGNA is challenging the constitutionality of Idaho Code § 58-317. In fact, there is nothing unconstitutional in this authorization to subdivide and plat endowment lands. Nor was there anything improper in the resulting common law dedication of roads and common areas nearly a century ago. What is unconstitutional is the Land Board's recent disposal of its residual fee interest in Community Beach.

Meanwhile, Intervenors continue to insist that SGNA lacks standing—an argument the State has abandoned. Intervenors fill out their brief with a repetition of prior arguments about indispensable parties and laches.

At the end of the day, Auction Opponents have provided no valid reason that the Hearing Officer should not reach the merits and find that disposal of the State's interest in Community Beach was unlawful. Doing so will open the door to a process similar to that undertaken voluntarily by the Land Board in the Tamarack Bay lease to find an solution acceptable to all. Once that is sorted out (with due consideration as to the improvements made by WWBDA), the Land Board may conduct an auction with safeguards to protect the easement held in common by all cottage site owners.

ARGUMENT

I. THE MERITS

A. Notwithstanding the 1924 and 1932 deeds, the State retained an interest in Community Beach, which it may convey only in compliance with public auction and other Trust requirements.

(1) The Land Board acknowledges that a common law dedication grants only an easement.

Having devoted most of its response brief to jurisdictional defenses, the Land Board turns briefly to the merits. *Board's Response Brief*, sections II and III(E). The Board begins with four critical concessions:

- First, the Land Board recognizes that the "public auction requirement applies to lands that are 'preserved and held in trust' for endowment beneficiaries." *Board's Response Brief* at 19.
- Second, it notes there was no applicable dedication statute on the books during the 1920s and 30s.[5] Accordingly, the Board acknowledges that any dedication flowing from those plats would be a common law dedication.[6] *Board's Response Brief* at 20.

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[5] The Land Board correctly acknowledges that, at the time of the early plats, statutory dedication applied only within cities or areas to be added to cities. *Board's Response Brief* at 20. Idaho's modern platting statute was not adopted until 1967. 1967 Idaho Sess. Laws ch. 429. Although codified to the title on Municipal Corporations, Chapter 13's current platting provisions (Idaho Code §§ 50-1301 to 50-1334) are not limited to cities; they also apply to unincorporated areas throughout the county.

[6] Common law dedication is a judicial device that accomplishes essentially the same result as a statutory dedication. It is employed where statutory dedication is unavailable or technical requirements for statutory dedication were not met. In *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908) (Sullivan, J), the platting of Arnold's Addition to the City of Boise occurred in 1878, prior to the first platting and dedication statute in 1893. Accordingly, there was no statutory dedication. Nevertheless, the Court found that a dedication occurred based on common law precedent. This principle is now referred to as common law dedication.

- Third, the Board concedes that a common law dedication (or a statutory dedication, for that matter) conveys only an easement, not the fee.[7] *Board's Response Brief* at 21 ("common law dedications create only an easement and do not transfer title").
- Fourth, the Land Board does not contest that it held no auction, made no appraisal, and received nothing of value from PLCSOA in exchange for the deeds.

These concessions paint the Land Board into a corner. If only an easement was conveyed in 1924/32, it necessarily follows that the grantor (the State) retained the underlying fee in Community Beach (the servient estate). Owing to its first concession, any conveyance of that fee interest must be by public auction designed to maximize the Trust's income while not impairing the easement.

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[7] The Board incorrectly states that this is a recent development in the law. It is not. The Idaho Supreme Court has held consistently for as long as it has recognized common law dedication that only an easement is conveyed. *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 225, 775 P.2d 111, 117 (1989) (Bengtson, J. Pro Tem.) (quoting *Boise City v. Hon*, 14 Idaho 272, 278, 94 P. 167, 168 (1908) (Sullivan, J.)) ("[T]he grantor, by making such a conveyance, is estopped, as well in reference to the public as to his grantees, from denying the existence of the easement."); *Deffenbaugh v. Washington Water Power Co.*, 24 Idaho 514, 519, 135 P. 247, 248 (1913) (Ailshie, C.J.) (labeling an area on the plat as a "beach" equated to a grant of "a perpetual easement in this beach to the purchasers of lots"); *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* ("*Ponderosa II*"), 143 Idaho 407, 409, 146 P.3d 673, 675 (2006) (Burdick, J.) ("Once common law dedication is accomplished, it has the legal effect of creating an easement in favor of the lot purchasers."); *Monoco v. Bennion*, 99 Idaho 529, 533, 585 P.2d 608, 612 (1978) (Bistline, J) ("We hold that the legal effect of illustrating a private road on a filed plat and 'dedicating' it is the creation of an easement in favor of the lot purchasers."); *Saddlehorn Ranch Owner's, Inc. v. Dyer*, 146 Idaho 747, 203 P.3d 677 (2009) ("Common law dedication does not grant ownership of the parcel in another, but a limited right to use the land for a specific purpose.").

(2) Notwithstanding its concession that a common law dedication grants only an easement, the Land Board contends it did not retain the underlying fee.

The Land Board scrambles to fashion an argument that its disposal of the fee did not violate constitutional and statutory requirements. It contends that by the time of the CC&Rs and *Quitclaim Deeds*, nothing was left in trust—at least as to the roads. *Board's Response Brief* at 20-21. Specifically, the Board contends that its common law dedications in 1924[8] and 1932 conveyed to cottage site owners not just an easement but all of the State's interest in the roads. *Board's Response Brief* at 21 (referring to "the possibility that bare fee title to the center of roads rested with purchasers of adjacent lots").

The Land Board asserts this argument solely with respect to roads.[9] Thus, it does nothing to fix the Land Board's constitutional violation with respect to Community Beach.[10] In any event, the cases relied on by the Land Board fall short, even with respect to roads.

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[8] The Land Board reports that the portion of the 1924 plat containing Community Beach is missing from the files of Valley County and IDL, but "likely" contained a dedication of Community Beach similar to the one in the 1932 plat. *Board's Response Brief* at 3 n.1, 5 n.5.

This is inconsistent with four prior IDL/Attorney General opinions, each of which identifies the 1932 plat as the first dedication. *Declaration of Matthew J. McGee*, Exhibits A and B; *Declaration of Christopher H. Meyer*, Exhibits H and I. Nevertheless, SGNA takes the Land Board at its word, despite the fact that it has produced no further evidence or explanation.

In any event, SGNA does not perceive that it makes any difference whether the dedication occurred in 1924 or 1932, given that lots have been sold subsequent to each date.

[9] That would make sense, because the road case it relies on, *Neider v. Shaw*, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (Kidwell, J.), is premised on a statute applicable only to roads (Idaho Code § 55-309).

If the Land Board means to suggest this principle applies to Community Beach, as well as to roads, that would vest fee title in the two SGNA members (the Bagleys and the Johnsons) who are the adjacent landowners.

And it would kneecap the Intervenors. If the State owned nothing, that would mean that (1) the *Quitclaim Deeds* conveyed nothing, (2) PLCSOA is not the owner of the underlying fee, (3) PLCSOA had nothing to lease to WWBDA, and (4) WWBDA's encroachment permit is invalid by its own terms because it does not own the littoral rights to Community Beach. (See lease discussion in section II.C(5) at page 34.) If this is true, the fee is owned collectively by all

(a) *Neider* is not on point.

The first case cited by the Land Board is *Neider v. Shaw*, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (Kidwell, J.). It held that statutory dedications grant only an easement.[11] *Neider* went on to allocate the underlying fee ownership (the servient estate) of a statutorily dedicated road that had never been built. *Neider* divided it at the centerline and allocated it to the two adjoining landowners. *Neider*, however, did not address how the adjacent lot owners became the owners of the underlying fee. The Court simply assumed the parties to the litigation (landowners on either side of the road) at some point acquired the residual fee after the dedication of the unbuilt road.[12] In short, *Neider* never explained or even considered how the landowners ended up with the fee after a statutory dedication. Accordingly, *Neider* is not useful precedent because (1) it involved a statutory dedication and (2) it did not address what happens to the residual fee.

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cottage site owners. And each must agree to any lease of littoral rights to WWBDA. SGNA could live with that.

[10] SGNA's *Petition* seeks no relief with respect to the roads. If the Land Board determines that its *Quitclaim Deeds* were valid with respect to the roads, that is of no concern to SGNA.

[11] The Court reached this conclusion notwithstanding a statute saying that a statutory dedication "is equivalent to a deed in fee simple." Idaho Code § 50-1312 (whose predecessor was then codified at Idaho Rev. Stat. 2304 (1908)). An odd result, but it is now the law.

[12] The whole centerline exercise was <u>not</u> performed for the ultimate allocation of ownership. Instead, it was undertaken by the Court in order to allow application of the principle of "boundary by agreement," which applies only where two properties are adjoining. Had fee title for the unbuilt road resided in the local government, the neighboring properties would not have been "adjoining," but would have been separated by a third property (the road). In other words, this elaborate exercise in getting rid of independent title to an unbuilt road was necessary to allow the Court to divide the property along the fence line.

(b) *Ponderosa II* disproves the Land Board's contention that it no longer owns the underlying fee.

Recognizing that *Neider* is not on point (because it dealt with a statutory dedication), the Land Board turned to another case, *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* ("*Ponderosa II*"), 143 Idaho 407, 410, 146 P.3d 673, 677 (2006) (Burdick, J.). *Board's Response Brief* at 21. This is strange, because *Ponderosa II* does not support the Land Board's position that it owned nothing by the time of the *Quitclaim Deeds*. *Ponderosa II* squarely addressed what happens to the fee after a common law dedication. It held that the fee stays with the original owner until expressly conveyed in a subsequent deed.

Ponderosa II involved a parcel on a plat set aside as "lake access." The facts set out in the decision are a bit sketchy. The briefs (2005 WL 2886709 and 2003 WL 23757933) show that the Respondent (Thayer) asserted ownership of the residual fee in the "lake access" parcel in order to obtain an encroachment permit for a marina.[13] The district court ruled and the Idaho Supreme Court affirmed "that Thayer owned the 'lake access' by virtue of a quitclaim deed from the McWilliams' [the original owner who filed the plat] heir to her." *Ponderosa II*, 143 Idaho at 409, 146 P.3d at 675. The Court made four key rulings:

- First, there was a "private" common law dedication of the lake access parcel (to lot purchasers, not to the public).

[13] "In 1991, the lot owners determined that they wanted to improve the 'lake access' and an agreement was signed between the property owners. The efforts after the signing of the agreement had been ultimately stopped in June, 1994, when Frank Thayer, President of Garfield Bay Resort, had plans to build a marina and made application with the Department of Lands for an encroachment permit to dredge out a portion of Lake Pend Oreille to accommodate such a marina. An issue arose as to the ownership of 'lake access' which precipitated the lawsuit." Appellant's Brief in *Ponderosa II*, 2005 WL 2886709 at *5.

- Second, all dedications (statutory or common law, private or public) convey only an easement. *Ponderosa II*, 143 Idaho at 410, 146 P.3d at 676.
- Third, the landowner filing the plat retains the fee. "Moreover, an easement does not divest the servient estate owner of title." *Id.*
- Fourth, that original landowner may later convey its residual fee interest to a third person. "Nor does creation of an easement divest the servient estate owner of the ability to transfer title." *Id.*[14]

Accordingly, the Court found that the original landowner/developer who filed the plat (McWilliams) still owned the fee (the servient estate, which was subject to the easement held by lot owners) and could later convey that residual fee interest in the lake access to Thayer (who needed the littoral rights to obtain an encroachment permit for a marina).

Ponderosa II is a perfect analogy to the situation here, in which PLCSOA obtained the residual fee by quitclaim in order to enable WWBDA to obtain an encroachment permit for a private dock. The Land Board (on behalf of the State) is the original owner who filed a plat creating a common law dedication of Community Beach. Under *Ponderosa II*, the State retains the residual fee in Community Beach (subject to an easement held collectively by cottage site owners). It follows that the Land Board may convey its residual interest in Community Beach, but only by public auction.

Thus, ironically, the Land Board has cited a case whose holding is directly contrary to its contention that it no longer held any meaningful interest in Community Beach. Instead,

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[14] In so ruling, the Court expressly rejected a contrary viewpoint expressed in 26 C.J.S. *Dedication* § 68 (2001), to the effect that no one can convey title to any part of the dedicated property. *Ponderosa II*, 143 Idaho at 410, 146 P.3d at 676.

Ponderosa II confirms that the State retained an interest, and thus violated the Constitution in conveying that interest without a public auction.

(c) Other common law dedication cases reinforce the conclusion that the State retains the fee.

We could stop here. *Ponderosa II* is perfectly clear that dedication creates only an easement, with the fee retained by the original owner. If more authority is needed, it may be found in decisions underscoring the need to carefully examine each common law dedication. These cases hold that dedication is not an automatic and arbitrary result of filing a plat. Rather, an examination of the underlying circumstances is required to determine the existence and extent of any dedication.

> In determining the intent to dedicate, "the court must examine the plat, as well as 'the surrounding circumstances and conditions of the development and sale of lots.'"

Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc., 139 Idaho 699, 701, 85 P.3d 675, 677 (2004) ("*Ponderosa I*") (Kidwell, J.) (quoting *Sun Valley Land and Minerals, Inc. v. Hawkes*, 138 Idaho 543, 548, 66 P.3d 798, 803 (2003) (Trout, J.) and *Dunham v. Hackney Airpark, Inc.*, 133 Idaho 613, 616, 990 P.2d 1224, 1226 (Ct. App. 1999) (Schwartzman, J.)) (restated again in *Ponderosa II*, 143 Idaho at 409, 146 P.3d at 675).

Here, an examination of the circumstances requires recognition that endowment lands are subject to important and unique constraints. Any dedication of such lands must be construed in a way consistent with maximizing economic benefit to the endowment beneficiaries.

This reinforces the conclusion in *Ponderosa II* that the dedication conveyed, at most, a private easement to cottage site owners while the State retained the underlying fee (and any economic value therein). Because it still owns something, the Land Board has two options. It

may retain its underlying fee, or it may dispose of it in a manner that maximizes revenue at public auction without impairing the easement.

This takes us back to what the Land Board always has known. For many years it has recognized, acknowledged, and acted consistently with its retained interest in Community Beach:

- IDL's legal memoranda recognized that the State "retained ownership thereof" and "retained title thereto." *Declaration of Matthew J. McGee*, Exhibit A (page 3) and Exhibit B (page 3).[15]
- The Land Board collected over $100,000 in rent from the Bagleys for their occupation of a tiny sliver of Community Beach that did not interfere with anyone's use of the beach.
- The Land Board expressly reserved the State's "fee title" ownership of Community Beach in the Bagley leases. *1985 Bagley Lease*, § 11, page 2 (*Declaration of Diane Bagley*, Exhibit F).
- The Land Board expressly acknowledged its right to sell the underlying property, recognizing that such a sale would be a disposal pursuant to Idaho Code § 58-313. *1985 Bagley Lease*, § 13, page 3 (*Declaration of Diane Bagley*, Exhibit F).

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[15] SGNA provided two of these IDL opinions in conjunction with *SGNA's MSJ. Declaration of Matthew J. McGee*, Exhibits A and B. The Land Board has ignored them in its briefing. SGNA recently located two more opinions, which are set out in the *Declaration of Christopher H. Meyer*, Exhibits H and I. One memorandum states:

> CONCLUSION: The trust responsibilities for the Board of Land Commissioners preclude the Board from divesting title to these trust lands by dedication even if the county has accepted the dedication. Thus, although the Board may sell tracts of endowment lands by subdivision pursuant to Idaho Code, §58-317, the Board retains title to roads, alleys, and access ways within the subdivisions.

- The Land Board stopped charging rent to the Bagleys after issuing the *Quitclaim Deeds*, allowing PLCSOA to do so instead.
- IDL issued WWBDA's encroachment permit "contingent upon WWBDA continuing to hold the required littoral rights" (which were held by the State as part of the residual fee until the Land Board's unlawful conveyance to PLCSOA).

In sum, it is evident from the Land Board's own actions and the cases it has cited in its own brief (most notably *Ponderosa II*) that the 1924/32 plats conveyed no more than an easement to other property owners for the use and enjoyment of Community Beach. The Land Board retained the underlying fee, as well as the right to convey that fee in a manner consistent with the easement and its sacred trust duties.

B. Recent deeds purporting to convey a future interest in the underlying fee to Community Beach do not trump the Land Board's Trust responsibilities.

The Land Board says it worried that the twenty-something deeds it recently issued (which purport to include a future interest in the underlying fee to common areas) might cause cottage site owners to sue if the Land Board did not issue the *Quitclaim Deeds*. *Board's Response Brief* at 21. A more blunt way of putting that would be: "If we don't stand by our mistake, people may get mad."

The Land Board's concern that it might get sued fails to resolve the underlying constitutional and statutory issues. If the Land Board included unconstitutional conveyance language in recent deeds, that is a problem it has created on top of the unconstitutional conveyance of the *Quitclaim Deeds*. That problem does absolve the Land Board of its error in unlawfully issuing the *Quitclaim Deeds*.

Memorandum from Legal Counsel to Director (Idaho Department of Lands) (Aug. 18, 1981) at p. 1 (*Declaration of Christopher H. Meyer*, Exhibit H).

In any event, the recent language in deeds to cottage site owners is not nearly so harmful as the *Quitclaim Deeds* to PLCSOA, because the cottage site deeds purport to convey a future interest in the fee to be held "in common in all holders of the right of use and enjoyment described above [*i.e.*, the easement right]." *Affidavit of Steven W. Strack.*, Exhibit 24, p 3. In other words, they do not purport to convey a future interest in the fee to a homeowners association whose board of directors has authority to run roughshod over the interests of a minority of its members who are most affected by changes to Community Beach. Thus, even if the recent cottage deed language were effective, it would require all cottage site owners to agree to any modification, destruction, or other action involving Community Beach (including a lease of littoral rights). If need be, SGNA members could live with such a veto power.

In sum, the Land Board's contention that it was obligated to issue *Quitclaim Deeds* to PLCSOA in order to comply with the twenty-something deeds that purport to convey a future interest in common areas makes no sense. Even if this purported future interest was constitutional and enforceable, the Land Board did not act in compliance with that future interest. The deeds say that the State's residual interest in the common areas "shall automatically vest in common in all holders of the [easement] right." *E.g.*, *Affidavit of Steven W. Strack.*, Exhibit 24, p 3. But the Land Board did not allow this to happen "automatically." Instead, it intervened and conveyed away the State's interest to a third party of its choosing (PLCSOA), over the objection of SGNA members, in violation of its obligation to maximize long term financial return.

Fascinating as it is, the legal consequence of this future interest deed language need not be addressed here. The effect of deeds issued by the Land Board other than the *Quitclaim Deeds* is beyond the scope of SGNA's *Petition*. Of course, in launching this contested case, the Land

Board has authority to expand the scope of this proceeding. SGNA, however, does not seek a broader ruling nor believe that one is necessary at this time.

C. The Land Board must not second guess the Framers and the Legislature by reaching its own conclusions about the value of Community Beach.

The Land Board justifies its defiance of the rules governing the disposal of Trust property by declaring that "any property interest remaining after the dedications, lot sales, and sales of future interests had no independent salable value and could not be auctioned in good faith." *Board's Response Brief* at 22 (emphasis supplied).

One wonders how it is that the Land Board could demand rental payments from the Bagleys in good faith, but could not, in good faith, accept bids on the sale of the same property. Likewise, one wonders how the Land Board could conclude that its residual estate had no value after it had collected over $100,000 in rental payments. If the Land Board nevertheless clings to the belief that the value of its retained fee interest is negligible, the right thing to do would be to disclose that belief at the time of auction.

An auction allows the market to test the Land Board's hypothesis that its property has no value. Instead of letting the market decide what it was worth, the Land Board conveyed this "worthless" property to one homeowner entity to the great disadvantage of another homeowner entity. Given the small fortunes that cottage site owners have paid to conduct this litigation, it would appear that the Land Board guessed wrong when it reckoned its remaining interest in the property was worthless. Indeed, it would seem that the prevention of this sort of miscalculation was the reason the Framers insisted on a public auction.

D. The Land Board can and should maximize endowment value by conditioning a public auction in a way that protects all property rights.

The Land Board acted lawfully when it platted the Payette Lake Cottage Sites in the 1920s and 30s, dedicating roads and common areas to the use and enjoyment of property owners, lessees, and their guests.[16] We may safely assume that this dedication enhanced the value obtained by the State in sales and leases, thereby complying with the Land Board's duties. As a result, every cottage site owner has a right, held in common with others, to use and enjoy Community Beach.

The Land Board concluded that the only way it could protect that easement was to convey its remaining interest (for a song) to PLCSOA.

> Additionally, the Land Board reasonably determined that given its past transactions, any remaining property interest it held could not be conveyed to any entity representing less than all lot owners, due to the risk of litigation that would arise if an exclusive entity managed the lands primarily for the benefit of its members, rather than the benefit of all subdivision lot owners or the public at large. Such risk is aptly illustrated in SGNA's brief, which makes no bones about the fact that it desired to obtain title to Community Beach to preserve it "in its natural, undeveloped state for quiet relaxation, dog walking, swimming, and other peaceful pursuits" by SGNA members.

Board's Response Brief at 22 (emphasis original).

This is nonsense at several levels:

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[16] In earlier briefing in this matter, SGNA was noncommittal as to whether the 1924/32 plats resulted in common law dedications and, if so, whether the dedication was to the public at large or to cottage site owners, lessees, and their guests.

Upon closer examination of the case law, SGNA is now persuaded that the 1924/32 plats did effect a common law dedication, but only a "private" dedication to owners, lessees, and their guests.

This is academic, however. Irrespective of whether the dedication was effective or what it conveyed, the State retained at least the residual fee. A public auction would be required with respect to whatever interest the State retained.

- First, SGNA never said it desires to limit access to its members. It said the opposite.[17]
- Second, it is not the Land Board's job to act as playground monitor resolving disputes among homeowners over common areas.
- Third, the Land Board is naïve to think that assigning its property to a homeowners association provides assurance that such entity will act in the best interests of all its members; such entities are as political and factionalized as anything known to man.
- Fourth, and most importantly, rather than dictating who will make decisions regarding Community Beach, the Land Board should simply condition the sale to protect the easement, and leave enforcement of the easement up to the parties.

Specifically, the Land Board may ensure that the easement is respected simply by disclosing (and recognizing in any conveyance) that the State's interest may be subject to an easement that precludes the purchaser from impairing access by cottage site owners and lessees or otherwise diminishing their use and enjoyment of the property.[18]

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[17] "To be clear, SGNA has no objection to either community use or public use. SGNA's goal is not to privatize Community Beach (which was the practical effect of the *Quitclaim Deeds*, functionally limiting its use to eight families). Indeed, SGNA's ideal outcome would be for SGNA to acquire Community Beach at auction and then to create a conservation easement to protect it in its natural state for the enjoyment of all cottage site owners. See *Declaration of Zephaniah Johnson* and *Declaration of Diane Bagley*." *SGNA's Opening Brief* at 19.

[18] Perhaps the Land Board could limit the bidding to owners and lessees of cottage sites within the subdivision. Doing so would prevent, for example, a conservancy group from acquiring the property. However, that restriction could run counter to the Land Board's obligation to maximize financial return and does not seem necessary given that the purchaser is constrained to do nothing with the land inconsistent with the easement.

Such a condition would prevent, for example, a bidder from acquiring Community Beach and converting it to a home site or other use inconsistent with its use and enjoyment by cottage site owners. On the other hand, the condition would not restrict a variety of uses that are consistent with the easement. For example, it would allow the prevailing bidder to acquire the property and build a playground, fishing pier, or a dock—or to preserve it in its natural state.

All of those uses are consistent with the easement.[19] It is not for the Land Board to dictate which use is best—or who gets to decide which use is best. The Land Board's only concern is to maximize Trust income in a manner that does not impair the prior easement. That requires an auction.[20] If it turns out that no one bids, then and only then may the Land Board elect to hand over the property for free to PLCSOA.

E. The possibility that a quiet title action might follow a declaratory ruling does not jurisdictionally preclude the Land Board from using a declaratory ruling to examine the applicability of the auction requirement.

The Land Board recently acted to rescind an unconstitutional lease at Tamarack Bay. See Land Board Minutes – Commercial Recreation Lease No. M500031 dated April 16, 2019 (*Declaration of Christopher H. Meyer*, Exhibit D) (also set out as Attachment A to SGNA's *Response to Land Board*). In apparent recognition that the Land Board's action in response to

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[19] Whether the easement would allow the purchaser of the residual fee to allow public access is an open question that need not be resolved here. Although SGNA does not oppose public use, public access may be inconsistent with the easement. See footnote 16 at page 20.

[20] In order to simplify the auction, encourage bidding, and, most importantly, maximize income, the Land Board should exercise its discretion to separately auction Community Beach and the roads. SGNA agrees with the Land Board that it is unlikely the remaining fee interest in the roads has any "independent resale value." *Board's Response Brief* at 22. If that portion of the property attracts no bidders, the Land Board may retain it or dispose of it as it sees fit. Including the roads in the auction of Community Beach has the potential of confusing bidders (who may believe that they are buying an obligation to maintain the roads), thereby failing to maximize Trust income.

the unlawful Tamarack lease is difficult to reconcile with its reluctance to examine the unlawfulness of the *Quitclaim Deeds*, it now labors to find a distinction between leases and deeds. The Land Board says it can undo permits, licenses, and even leases, but deeds are another matter.[21] *Board's Response Brief* at 11.

Specifically, the Land Board says that "a written document purporting to convey property" may only be challenged in a court of law. *Id.* Wasn't the Tamarack lease a conveyance of property? The Land Board evidently did not feel constrained from rescinding that conveyance.

In any event, even if a subsequent quiet title judgment or other negotiated resolution is required to put all this to rest, the Land Board has offered no good reason that it may not express its conclusion that it acted improperly in issuing the *Quitclaim Deeds*.

Curious as well is the Land Board's suggestion that rather than seeking a declaratory ruling from the Land Board, SGNA should have sought a declaratory judgment in court. *Board's Response Brief* at 12. Perhaps it could have done that. But SGNA thought it wiser and better for all concerned to bring this matter first to the attention of the Land Board. As the Board said in the Tamarack matter:

> The best thing for the Board to do is to rescind the lease and then to engage in proper processes that meet the financial, legal, and constitutional requirements to offer this property at lease, which will give the greatest opportunity for all of the parties involved to address that lease. . . . Attorney General Wasden stated that this provides an opportunity to address the lessees, and to see that they are legally made whole.

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[21] Adding "leases" to this list apparently was a last minute addition, as reflected in the redline version of its brief initially submitted by the Land Board.

Land Board Minutes, pages 8-9 (Apr. 16, 2019) (*Declaration of Christopher H. Meyer*, Exhibit D).

That is well said by the Attorney General, and just as applicable here.

II. JURISDICTION AND OTHER ISSUES

A. The Land Board has subject matter jurisdiction under Idaho Code § 67-5232.

(1) The statute's reference to "any person" should resolve both standing and subject matter jurisdiction.

The Land Board concedes that the broad language in Idaho's declaratory ruling statute eliminates the standing requirement. "Respondent makes this limited concession because the declaratory ruling statute, on its face, allows 'any person' to petition for such a ruling." *Board's Response Brief* at 18. One would think that this language also makes clear that the Land Board has subject matter jurisdiction to hear a petition from any person, even one who arguably could have sought judicial review in connection with the issue.

(2) Auction Opponents have abandoned their reliance on *Shobe*.

The Land Board previously contended that, under *Shobe v. Ada County* ("*Shobe I*"), 126 Idaho 654, 889 P.2d 88 (1995), the declaratory ruling provision of the IAPA does not allow "a declaratory ruling on a legal issue." *Respondent's Response in Opposition to Petitioner's Motion to Compel Discovery*, at 2 (Oct. 25, 2018). (See discussion in *SGNA's Opening Brief* at 22-24.) Auction Opponents have abandoned that argument. As well they should.

(3) In the *Firefighters II* case, the Idaho Supreme Court upheld use of a declaratory ruling employed in support of backwards-looking claims.

The Land Board contends that Idaho Code § 67-5232 is available only to members of the regulated community who seek forward-looking guidance on actions they contemplate taking. In *SGNA's Opening Brief* at 24, SGNA offered *Idaho Retired Fire Fighters Ass'n v. Public*

Employee Retirement Bd. ("*Firefighters I*"), IC 17-000044, 2017 WL 6949778 (Idaho Indus. Comm'n, Dec. 29, 2017) as an example of a "backwards-looking" declaratory ruling made by an Idaho agency. In its response brief, the Land Board informs the Hearing Officer that *Retired Firefighters I* was vacated last month by *Idaho Retired Fire Fighters Ass'n v. Public Employee Retirement Bd.* ("*Firefighters II*"), 2019 WL 2455584 (Idaho, June 13, 2019). *Board's Response Brief* at 10.

This is misleading. The decision by the Idaho Industrial Commission was vacated due to a technical misstep in the appeal process, not because of a jurisdictional limitation on the use of declaratory rulings.[22] Indeed, the Court expressly ruled that the Appellants "properly filed both the declaratory judgment request and any potential claims for benefits under the FRF with the Board." *Firefighters II* at *2.[23] This is a ruling on the merits (undisturbed by the vacation of the

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[22] The convoluted procedural history of the *Firefighters* litigation is not relevant to the key point made here (that the Court approved use of a declaratory ruling in a backwards-looking context). Nonetheless, SGNA offers this brief summary to assist the reader in deciphering the case.

The Firefighters filed a petition for declaratory ruling with the Idaho Industrial Commission. The Commission rejected the petition, saying that the Firefighters should have filed it with the agency below (the Public Employment Retirement Board of Idaho). Accordingly, the Firefighters then filed their petition with the Board. The Board issued a declaratory ruling on the merits, but contrary to the position urged by the Firefighters. The Firefighters then appealed the declaratory ruling to the Commission, and the Commission affirmed the declaratory ruling. The Firefighters then appealed the Commission's affirmance of the Board's declaratory ruling to the Idaho Supreme Court. The Supreme Court never reached the merits. Instead, it ruled, *sua sponte*, that the Firefighters' intermediate appeal to the Commission was procedurally wrong. Instead, they should have skipped the Commission and sought district court review of the Board's declaratory ruling.

In so ruling, however, the Idaho Supreme Court expressly ruled the Firefighters' use of the declaratory ruling (as the first step to obtain reimbursement for underpaid claims) was an appropriate use of a declaratory ruling. It went on to waive the 28-day appeal deadline to enable the Firefighters to seek judicial review following the remand.

[23] The *Firefighters II* Court sometimes employs the phrase "declaratory judgement" rather than "declaratory ruling." Both are used to refer to a declaratory ruling issued by an agency pursuant to Idaho Code 67-5232, not to a declaratory judgment issued by a court.

Industrial Commission's affirmance of the declaratory ruling) that the declaratory ruling was the proper vehicle for determining the question presented. The Court went out of its way to ensure that, despite the procedural setback, an appeal of the declaratory ruling would ultimately occur. (The Court said that due to "the complexities and uncertainties regarding jurisdiction in this case," the Appellants were excused from the 28-day appeal deadline in the APA and were welcome to file a new appeal. *Firefighters II* at *6.)

The Land Board further misinforms the Hearing Officer when it says the Firefighters' petition did not challenge past agency action:

> Even had the decision not been vacated, it does not support SGNA's petition, for there, the petition sought a declaratory ruling on applicability of laws to current or future circumstances, not past agency conduct. . . . The petitioners challenged the methodology then being used by PERSI to calculate COLAs—they were not challenging past agency actions.

Board's Response Brief at 10 (emphasis omitted). This flatly wrong.

In fact, the Firefighters challenged PERSI Director Donald Drum's prior "decision to include the reservists" in its calculation of the cost-of-living adjustment ("COLA"). Appellants' Brief at *3, 2018 WL 3222830 (June 6, 2018). The Firefighters' brief to the Idaho Supreme Court makes clear that they were looking not just to a correction in the COLA for future payments, but for a multi-year backward correction to Director Drum's decision. "Extrapolating the first year loss of benefits of $251,000 in 2013 over the intervening five years, puts the total benefits reduction for the now-elderly retired firefighters at well over a million dollars." Appellants' Brief at *9, 2018 WL 3222830 (June 6, 2018).

It is evident that the Idaho Supreme Court understood the backwards-looking effect of the declaratory ruling. It noted that the Firefighters "properly filed both the declaratory judgment request and any potential claims for benefits." *Firefighters II* at *3. Claims for benefits are

inherently backwards looking. One does not need to file a claim to get the benefit of a forward-looking recalculation of the COLA; one would simply wait to see the new COLA reflected in the forthcoming retirement checks.

The Court went on to recognize that if and when a declaratory ruling favorable to the Firefighters issued, there would be backwards-looking repercussions from that ruling:

> Here, the gravamen of the petition is to secure a declaratory ruling. The entire petition's language is devoted to the legal determination of how to calculate the annual COLA. Any potential request for monetary benefits from the Individual Claimants was solely predicated on the outcome of the declaratory ruling. . . . [A]ny claims in this context are contingent on the declaratory judgment . . . .

Firefighters II at 5.

Any doubt that the petition for declaratory ruling sought backward-looking relief is eliminated by examination of the petition itself (which was included in the record before the Idaho Supreme Court). See paragraph 24 of the petition and the prayer for relief ("an order directing payment of back benefits pursuant to the recalculated COLAs"). *Declaration of Christopher H. Meyer*, Exhibit B. Also see the email from the Firefighters' counsel confirming that the purpose of the petition was to obtain back benefits. *Christopher H. Meyer*, Exhibit C.

The parallel to what SGNA seeks here is striking. The Land Board has made plausible arguments that it lacks the power to void the *Quitclaim Deeds* and that some subsequent action (either judicial or negotiated) may be required. That sequence tracks what the Idaho Supreme Court said could properly happen with the declaratory ruling in *Firefighters II*. "Any potential request for monetary benefits from the Individual Claimants was solely predicated on the outcome of the declaratory ruling." *Firefighters II* at *5.

(4) The foreign cases cited by the Land Board are distinguishable.

In the *Board's Opening Brief*, it cited a handful of out-of-state cases for the proposition that declaratory rulings may be employed only to allow members of the regulated community to obtain a forward-looking ruling on how their conduct will be viewed by the agency. SGNA has shown in prior briefing that those cases are distinguishable. More importantly, they are foreign decisions based on foreign statutes, and are irreconcilable with *Firefighters II* (which allowed backward-looking relief in a declaratory ruling).

In the *Board's Response Brief*, it adds to its collection of foreign authority. These cases, too, are readily distinguishable and/or inapposite.[24]

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[24] The Land Board cites an unpublished 2002 decision from Iowa. *Int'l Union, United Auto, Aerospace, Agric. & Implement Workers of Am. v. Iowa Dep't of Workforce Dev.*, 2002 WL 1285965 (Iowa 2002). Iowa's civil rules provide: "Unpublished opinions or decisions shall not constitute controlling legal authority." Iowa Court Rules 6.904(2)(c).

It is also irrelevant. It construes Iowa's declaratory order statute, not Idaho's declaratory ruling statute. The difference is significant. Iowa's statute provides that "the general policy of this chapter [is] to facilitate and encourage agency issuance of reliable advice." Iowa Administrative Procedure Act, Iowa Code Ann. § 17A.9(2). In other words, Iowa's statute is intentionally targeted at forward-looking agency advice to assist members of the regulated community. See, Arthur Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731, 807 (1975). Idaho's statute contains no such "general policy."

For the same reason, *Women Aware v. Reagan*, 331 N.W.2d 88, 92 (Iowa 1983), is not good authority in Idaho.

The Land Board cites *In Re State Aid Highway No 1, Peru*, 328 A.2d 667 (Vt. 1974). This case is similar to the Hawaii cases and *Petition of D.A. Assoc.*, 547 A.2d 1325 (Vt. 1988), all of which were discussed in prior briefing. *State Aid* held that when judicial review is available in a contested case, it is the exclusive means of review. The Land Board does not mention the subsequent case of *City of S. Burlington v. Vermont Elec. Power Co.*, 344 A.2d 19 (Vt. 1975), which found that use of a declaratory judgment (the Vermont term for declaratory ruling) was permissible, distinguishing *State Aid*. "We do not consider that any language in *In re State Aid Highway No. 1, Peru, Vermont*, 133 Vt. 4, 328 A.2d 667 (1974) is the basis for a contrary holding. That case dealt with an attempt to overrule the decision of a District Commission in a contested case by declaratory judgment, rather than by the prescribed appeal, a course we held without statutory basis. No such question is here involved." In other words, the exclusivity of judicial review should be limited to cases in which there has been a prior appealable order in a contested case.

(5) The Land Board relies on an Idaho case that is unpublished and not on point.

Finally, the Land Board cites an unpublished Idaho Court of Appeals case, *Idaho State Speech & Hearing Serv. v. Brown*, 2009 WL 9151503 (Idaho Ct. App. 2009). The caption reads: "no unpublished opinion shall be cited as authority to any court." The decision contains some broad language about the exclusivity of judicial review, but it was not offered in the context of a declaratory ruling.

In *Brown*, the *pro se* appellant filed an untimely petition for judicial review of an unfavorable administrative order against him in a clearly reviewable contested case. When the agency later brought a civil action to recover costs imposed on him in the agency's order, the defendant sought to challenge the ruling by way of counterclaim. Not surprisingly, the Court of Appeals said that was too late. That is hardly precedent (even if it were a reported decision) for precluding use of a statutorily authorized procedure (declaratory ruling) to address an issue for the first time, where there has been no prior contested case.

That the Land Board would rely on this and other inapposite, unreported decisions shows how far it must stretch to find support for its jurisdictional defense.

B. SGNA is not challenging the constitutionality of Idaho Code § 58-317.

Another argument presented by the Land Board, in what feels like a game of whack-a-mole, is based on its spurious allegation that SGNA seeks a declaration of the unconstitutionality

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Finally, the Land Board cites another Hawaii case, this time quoting from the concurring and dissenting opinion. *AlohaCare v. Ito*, 271 P.3d 621, 656 (Hawaii 2012) (Acoba, J., concurring and dissenting). The case is not on point; the decision upheld a declaratory ruling. The issue in the case was who could appeal a declaratory ruling. The quoted language from the dissenting portion of Justice Acoba's opinion contained some broad language about declaratory rulings in Hawaii being applicable to "an agency action not yet taken," but this was purely dictum within the dissent.

of Idaho Code § 58-317. The Land Board offers this contrivance in the hope of showing that "[s]uch a determination is outside the authority of the Hearing Officer." *Board's Response Brief* at 15.[25]

SGNA has never mentioned the statute, much less sought a ruling on its constitutionality. Indeed, there is nothing unconstitutional in this innocuous statute, which merely authorizes the Land Board to subdivide, plat, and sell State endowment lands at public auction. The statute does not compel the Land Board to take any particular action. It most certainly does not compel the Land Board to violate its constitutional obligations with respect to public auctions or the maximization of the Trust's financial position with respect to any interest retained by the State after platting and dedication.

The Land Board has authority under Idaho Code § 58-317 to plat roads and common areas like Community Beach. Accordingly, the selling of lots at auction pursuant to such plats created a common law dedication (which must be construed in the context of the State's trust obligations). As a result, under *Ponderosa II*, owners of cottage sites within the subdivision hold in common an easement to use and enjoy Community Beach, while the State retains the underlying fee. All this is perfectly constitutional and perfectly consistent with Idaho Code § 58-317.

Indeed, IDL's legal counsel said so: "Thus, although the Board may sell tracts of endowment lands by subdivision pursuant to Idaho Code, §58-317, the Board retains title to

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[25] The Land Board contends that in enacting section 58-317, the Legislature "had to understand" that "it was also granting the accompanying authority, under the common law, to establish roads and other areas subject to either the use of the general public or the private use of all lot owners." *Board's Response Brief* at 14. Actually, it does not matter whether the Legislature "understood" this or not. Common law dedication is a purely judicial creation; it operates independent of legislative intent.

roads, alleys, and access ways within the subdivisions." Memorandum from Legal Counsel to Director (Idaho Department of Lands) (Aug. 18, 1981) at p. 1 (*Declaration of Christopher H. Meyer*, Exhibit H).

What is contrary to both our Constitution and our statutes (and was not compelled by Idaho Code § 58-317) is the Land Board's decision to convey its residual fee title without holding a public auction or maximizing the State's financial interest. Determining whether and how those constitutional and statutory mandates are applicable to the issuance of the *Quitclaim Deeds* falls squarely within Idaho Code § 67-5232.

C. SGNA's standing is not a bar to this proceeding.

(1) The Land Board has abandoned in challenge to SGNA's standing.

The Land Board now concedes that standing is not an issue in this proceeding. *Board's Response Brief* at 18-19.[26]

(2) Intervenors have abandoned their challenge to SGNA's standing based on the *Selkirk* cases.

In response to standing arguments made informally by Intervenors' counsel to SGNA's counsel, SGNA addressed the *Selkirk* cases[27] in *SGNA's Opening Brief* at 42-47. In its briefing, Intervenors have not responded to SGNA or pursued that line of argument, thus conceding that the *Selkirk* cases present no bar to standing.

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[26] Intervenors say they agree with the Land Board. "PLCSOA and WWBDA hereby adopt and incorporate the [Board's Response Brief]." *Intervenors' Response Brief* at 2. One must assume that Intervenors did not understand what was in the Land Board's brief, because Intervenors' brief and motion to strike continue to attack SGNA's standing.

[27] *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.); *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.).

(3) Intervenors fail to address the line of authorities holding that standing does not apply in administrative matters, or that standing may be waived.

SGNA explained in its opening brief that Article III standing does not apply to administrative matters or, in any event, should be waived. *SGNA's Opening Brief* at 27-35. Intervenors offer no response, other than this:

> Therefore, even if a formal standing analysis does not need to be applied in an administrative proceeding, surely there is a fundamental premise that whenever a party asks a tribunal for relief, there must be some basis for that party to appear in the tribunal in the first place, coupled with some ability of the tribunal to grant the requested relief.

Intervenors' Response Brief at 4.

That sounds like a grumbling concession that standing is not an issue here. Yet, without offering an explanation of why the law of standing applies, Intervenors once again contend that SGNA lacks Article III standing. *Intervenors' Response Brief* at 6-13.

(4) SGNA's injury is fairly traceable to the challenged action.

Intervenors contend there is no fairly traceable connection between the unlawful issuance of the *Quitclaim Deeds* and the injury SGNA's members have suffered. *Intervenors' Response Brief* at 6-9.

To begin, this contention is premised on Intervenors' false impression that the construction of the massive[28] dock at Community Beach is the only injury suffered. That is a large part of the injury, but SGNA members (as well as everyone else, except the eight families who have dock slip leases) also suffer from the loss of the pristine nature of Community Beach itself. In any event, SGNA has traced a connection both to the degradation of Community Beach

[28] "The proposed dock is 1,520 square feet." *Preliminary Order*, ¶ 16, p. 10 (*Declaration of Christopher H. Meyer*, Exhibit G).

and to injury associated with the dock.

There can be no mistaking the causal connection between the illegal conveyance and the physical changes both to Community Beach and to the adjacent shore and lake. Without the conveyance, WWBDA would not have been able to acquire the permit to build the dock, and PLCSOA would not have been able to authorize the destruction of trees and other vegetation and the conversion of Community Beach to a private parking lot for 4-wheelers, golf carts, and vehicles now used only by eight families and their many invitees who hold leases for the dock slips.

Intervenors ponder whether SGNA's standing would be different if the dock was not constructed for 10 or 20 years. If that were the case, perhaps Intervenors could contend that the placement of the dock was so completely unforeseeable as to render the causal connection not "fairly traceable." But that hypothetical is not what occurred.

As early as 2013, SGNA members communicated to IDL their concern over what might happen to Community Beach if it were conveyed to PLCSOA. The letter from then counsel Jay Gustavsen to IDL dated September 23, 2013, expressed concern about adverse impact to the "market value" of cottage sites owned by SGNA members if Community Beach, which was then limited to "Foot Traffic Only," were conveyed to "a large association with a geographically distant Board of Directors." Letter from Jay Gustafsen to Kate Langford (IDL) (Sept. 23, 2013) (attached as Ex D to *Declaration of Diane Bagley* (Apr. 15, 2019)).[29]

As it turned out, SGNA was prescient. Once PLCSOA obtained ownership of the underlying fee, it worked to facilitate the conversion of Community Beach to a parking lot and

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[29] In that letter, SGNA urged IDL to convey Community Beach to it, instead of PLCSOA. Needless to say, SGNA now recognizes that neither conveyance, without a public auction, would be proper.

dock facility. WWBDA was incorporated on July 26, 2016, just a year and a half after the *Amended Quitclaim Deed*, and PLCSOA leased its littoral rights to WWBDA six months later on January 12, 2017.

(5) The harm suffered by SGNA is redressible.

Intervenors contend that the relief sought by SGNA is pointless because, even if the *Quitclaim Deeds* are found unconstitutional and ultimately voided or rescinded, this will not affect the dock lease held by WWBDA. *Intervenors' Response Brief* at 9-13.

This assertion is contradicted by WWBDA's own encroachment permit application, which recognized that its authority to seek a permit was premised on PLCSOA's ownership of Community Beach and PLCSOA's lease of littoral rights to WWBDA:

> In other words, a littoral right is the right to access the lake, and it belongs to the owner of the property adjacent to the lake. As of April 23, 2014, the owner of Community Beach became PLCSOA.

Cover letter for encroachment permit application, from Tricia K. Soper to Idaho Department of Lands ("*Soper Letter*") at 2 (Jan. 17, 2017) (*Declaration of Christopher H. Meyer*, Exhibit A).

The *Soper Letter* went on to explain that the littoral rights conveyed by the *Quitclaim Deeds* are different from the easement to use and enjoy roads and common areas created by the 1924/32 dedication and recited in recent deeds:[30]

> The language of these prior deeds ensures the subdivision owners the "right of enjoyment and use in and to the common areas." However, enjoyment and use are simply not the equivalent

[30] The deeds submitted in the *Affidavit of Steven W. Strack* show that in recent decades the Land Board has included deed language describing the easement created by the 1924/32 plats that is held in common by all subdivision lot owners. For example: "With respect to Parcels 1 through 9 above, with this deed goes a right of enjoyment and use, in and to the common areas, parks, beaches, reserves, roads, sewer systems, water systems and all other common facilities of Amended Payette Lake Cottage Sites Subdivision . . . ." *Affidavit of Steven W. Strack*, Exhibit 24, p. 3. SGNA concurs with this recitation.

> of the littoral rights to the common areas. In other words, "enjoyment and use" is clearly not the same as maintaining adjacency and access to the lake itself, which is the definition of littoral rights. Essentially, this language simply confirmed the cottage owners' right to continue enjoying and using *the State's* littoral rights to the common beach areas.
>
> This interpretation also makes sense historically. Before the State of Idaho divested itself of all common areas and conveyed the same to PLCSOA in 2014, the State owned the common areas, including common area beaches and their accompanying littoral rights. It makes no sense that the State would "convey" its littoral rights to certain cottage site owners in the deeds of 1998 and 2001, thereby severing its ownership of the land from its ownership of the littoral rights. . . .
>
> . . . If the state had intended to actually "convey" its littoral rights, it surely knew how to do so. The term "littoral rights" would have been used rather than simply the words "right of enjoyment and use." This is especially true given that the State itself has defined the term "littoral rights" under statute.

Soper Letter at 2-3 (emphasis original). In other words, but for the *Quitclaim Deeds*, Intervenors had no littoral rights and no ability to obtain an encroachment permit.

Intervenors' contention that the invalidation of the *Quitclaim Deeds* would have no effect on WWBDA's encroachment permit is contradicted also by the preliminary and final orders approving the permit. The permit approval demonstrates that the State agreed with the analysis provided by Ms. Soper (that it is contingent on ownership of the littoral rights):

> On the basis of the record, it is my order that Encroachment Permit No. L-95-S-683 is approved by IDL contingent upon WWBDA continuing to hold the required littoral rights. In addition, as long as the lease between PLCSOA and WWBDA remains in effect, no other individual or entity is qualified to make application for an encroachment permit for the Community Beach.

In the Matter of Encroachment Permit Application No. L-95-S-683, State Board of Land Commissioners, at p. 2 (Final Order, Apr. 28, 2017) (emphasis supplied).[31] *Declaration of*

[31] The reference to Application No. L-95-S-683 appears to be in error in the Final Order. The Preliminary Order and other documents refer Application No. L-65-S-683.

Christopher H. Meyer, Exhibit F. The necessity to hold the littoral rights in order to obtain an encroachment permit is discussed more thoroughly in the preliminary order.[32]

Nor may WWBDA assume that if its encroachment permit is terminated, it will readily be able to obtain a new one. When IDL issues an encroachment permit to an entity that does not own the littoral rights, it has required (as it must) consent from all owners of the common area easement. For example, in 1991 IDL denied an encroachment permit application for a dock off Community Beach due to objections from some SGNA members.

> This office has received several letters from the owners of property in the subdivision surrounding the site of the dock proposal.
>
> I have reviewed the comments made and in light of these and after review of our obligations to owners within the subdivision the Department must deny your application to install a dock on this access site.

Letter from IDL Area Supervisor William J. Petzak to Robert Hamill dated February 5, 1991 (*Declaration of Christopher H. Meyer*, Exhibit E).

The issuance of the *Quitclaim Deeds* to PLCSOA circumvented this important requirement of a consensus among those who hold in common rights to use and enjoy Community Beach. The only legitimate and constitutional way to avoid that consensus requirement is to hold a public auction of the fee and associated littoral rights. This is as it should be. If people want to build a dock that is detrimental to other subdivision owners who

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[32] The preliminary order noted, for example:

"Under the Rules, a riparian or littoral owner is defined as '[t]he fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease or other grant.' IDAPA 20.03.04.010.033." Preliminary Order in the Matter of Encroachment Permit Application No. L-65-S-683 ("*Preliminary Order*"), ¶ 7, p. 8 (*Declaration of Christopher H. Meyer*, Exhibit G).

"PLCSOA is the littoral owner, as defined in IDAPA 20.03.04.010.033." *Preliminary Order*, ¶ 9, p. 9.

"IDAPA 20.03.04.020.02 provides that: '[o]nly persons who are littoral owners or lessees shall be eligible for encroachment permits.'" *Preliminary Order*, ¶ 12, p. 9.

will not give their permission, they should be required to pony up at a public auction and outbid the objecting owners. This is the market-based solution envisioned by the Framers.

D. There is no need to join other "indispensable parties."

SGNA's MSJ was directed to the merits and to two threshold issues (standing and subject matter jurisdiction). It is unclear why Intervenors repeated their prior arguments about indispensable parties in their response to *SGNA's MSJ*. See *Intervenors' Response Brief* at 15. SGNA has addressed the issue of indispensable parties in SGNA's *Response to Intervenors* at 5-14.

E. Laches

Likewise, it is unclear why Intervenors bring up laches in response to *SGNA's MSJ*. SGNA addressed laches and equity in *SGNA's Response to Intervenors* at 5-9. SGNA offers this brief further response.

Intervenors repeat their prior mischaracterization of their own affidavits. "Additionally, many cottage sites have been auctioned off for higher prices in reliance of the Deeds." *Intervenors' Response Brief* at 15. The affidavits contain no statements that they paid more because of the *Quitclaim Deeds*. The affiants state only that the land is worth more because of beach access.

It is obviously true that beach access enhances property value. But the these cottage sites have always had access to Community Beach (due to the original plats, not the *Quitclaim Deeds*). Indeed, they will continue to have beach access even if the *Quitclaim Deeds* are ultimately invalidated.

Although the affidavits speak of "beach access," perhaps this is a euphemism for the dock spaces they would later lease from WWBDA. Given the uncompetitive price paid for those

leases and the lack of any compensation paid by PLCSOA for the *Quitclaim Deeds*, this is undoubtedly an economic windfall for the lessees.

Even if the purchasers did pay a modestly higher price (based on the hope of later obtaining their dock slips), any subsequent increase in the value of their properties inflicted a corresponding well-documented and dramatic decline in the property value of other cottage sites.

This is hardly a compelling equitable argument for Intervenors. The real equitable issue here cuts against Intervenors. They obtained a windfall, not only at the expense of others homeowners, but at the expense of the Trust.

CONCLUSION

For the reasons set out above, SGNA respectfully urges the Hearing Officer to submit to the Land Board a recommended order declaring:

- The Land Board has jurisdiction to issue a declaratory ruling addressing the applicability of Idaho law to the Land Board's issuance of the *Quitclaim Deeds*.
- The 1924/32 plats resulted in a private common law dedication of Community Beach, but the State retained the residual fee interest, including littoral rights.
- Any disposal of the State's retained interest in Community Beach must be in accordance with Idaho law requiring an appraisal and a public auction designed to maximize the State's long-term financial return.
- Any disposal of the State's retained interest in Community Beach must be structured to protect the easement for the use and enjoyment of Community Beach held in common by owners of cottage sites within the subdivision.
- Because the above steps were not followed, the *Quitclaim Deeds* were issued contrary to Idaho law.

- The Land Board must work with the parties and other affected interests to address and rectify the error it made in issuing the *Quitclaim Deeds*, the CC&Rs, and any prior deeds to achieve compliance with its Trust duties, and to make WWBDA whole for improvements it made to Community Beach in reliance on the *Quitclaim Deeds*.
- If necessary to achieve or to implement resolution of this matter, subsequent judicial confirmation or negotiated settlement should be employed to quiet title in the name of the State.

Respectfully submitted this 15th day of July, 2019.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

SPINK BUTLER, LLP

By _____
T. Hethe Clark
Matthew J. McGee

Attorneys for Petitioner, Sharlie-Grouse Neighborhood Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of July, 2019, the foregoing (together with attachments or exhibits, if any) was filed, served, and copied as follows:

DOCUMENT FILED:

IDAHO DEPARTMENT OF LANDS c/o Renee Miller 300 North 6th Street, Suite 103 Boise, ID 83720-0050 Facsimile: 208-382-7107	☐ ☒ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile (208-382-7107) E-mail

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Christopher H. Meyer

Attachment A **INDEX TO DECLARATIONS AND EXHIBITS OFFERED BY SGNA**

I. Declaration of Zephaniah Johnson

Exhibit A. Map of SGNA and Community Beach

Exhibit B. Map showing SGNA and PLCSOA

II. Declaration of Diane Bagley

Exhibit A. 1932 Plat (Amended Plat of State Land – Payette Lake Cottage Sites)

Exhibit B. 2013 Plat (State Subdivision – Southwest Payette Cottage Sites)

Exhibit C. IDL's letter regarding termination of Bagley lease, dated June 24, 2013

Exhibit D. SGNA's request to IDL, dated September 23, 2013

Exhibit E. IDL's response to SGNA's request, dated Oct. 8, 2013

Exhibit F. Special Lease No. M-294-94 ("*1985 Bagley Lease*")

Exhibit G. Lease No. M-5015-4 ("*1995 Bagley Lease*")

Exhibit H. Miscellaneous Surface Lease No. M-5015 ("*2005 Bagley Lease*")

Exhibit I. Letter from PLCSOA to Bagley family, dated March 1, 2016

Exhibit J. Letter from PLCSOA, dated August 15, 2016

Exhibit K. Non-Exclusive Lease Agreement with PLCSOA, dated July 24, 2018

III. Declaration of Matthew J. McGee

Exhibit A. Memorandum from Legal Counsel to Assistant Director (Idaho Department of Lands) with the subject line "Payette Lakes Subdivisions," dated September 4, 1979

Exhibit B. Memorandum from Bob Becker, Deputy Attorney General to Stan Hamilton (Idaho Department of Lands) with the subject line "Dedicated Streets, Roads, Etc. on Lands Adjacent to Payette Lake," dated September 19, 1986

IV. Declaration of Christopher A. Mothorpe

Exhibit A. Curriculum Vitae

Exhibit B. Report and Professional Opinion, dated August 11, 2018

V. Declaration of Mark Richey

Exhibit A. Declaration of Mark Richey in Opposition to Intervenor Defendant's Second Motion for Summary Judgment (Case No. CV-2017-204), dated February 27, 2018

Exhibit B. Consultant's Report, dated Oct. 1, 2018

VI. Declaration of Christopher H. Meyer

Exhibit A. Letter from Tricia K. Soper to the Idaho Department of Lands, dated January 17, 2017

Exhibit B. Petition For Declaratory Ruling and Complaint in the matter of the *Idaho Retired Fire Fighters Association, et al. v. Public Employee Retirement Board*, dated November 24, 2015

Exhibit C. Email exchange between James Piotrowski, counsel for the Idaho Retired Fire Fighters Association, and Christopher H. Meyer, dated June 20, 2019

Exhibit D. Idaho State Board of Land Commissioners final minutes from its regular meeting on April 16, 2019 regarding Commercial Recreation Lease No. M500031 (Tamarack Bay)

Exhibit E. Letter from William J. Petzak, Area Supervisor, Idaho Department of Lands, to Robert Hamill (applicant for an encroachment permit for Cougar Island Association), dated February 5, 1991

Exhibit F. Final Order re Encroachment Permit Application No. L-95-S-683, issued to WWBDA, dated April 28, 2017

Exhibit G. Preliminary Order re Encroachment Permit Application No. L-65-S-683, issued to WWBDA, dated April 27, 2017

Exhibit H. Memorandum from Legal Counsel to Director (Idaho Department of Lands) with the subject line "Hansberger – Dedication of Plat," dated August 18, 1981

Exhibit I. Memorandum from Bob Becker, Deputy Attorney General, to Bill Petzak, Area Supervisor, Payette Lakes (Idaho Department of Lands), with the subject line "Dedicated Streets, Roads, etc. on Lands Adjacent to Payette Lake, dated January 21, 1987